APPENDIX

[fol. 1]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

Criminal No. 1991

THE STATE OF FLORIDA, Plaintiff,

vs.

DENNIS MANAFORD WHITNEY, Defendant.

MOTION FOR RELIEF UNDER CRIMINAL PROCEDURE, RULE No. 1 —Filed January 7, 1965.

DENNIS MANAFORD WHITNEY, through his undersigned attorneys, moves this Court for relief under Criminal Rule of Procedure No. 1, and as grounds therefor states:

1. A Gray Audiograph disc recording of his extra-judicial confession was improperly admitted into evidence, without objection by his trial counsel.

a) The Petitioner at the time he made this extra-judicial confession was 17 years old, with limited education and no legal experience. He did not realize he was entitled to counsel, was not offered counsel and was not advised that he need not incriminate himself by a confession. Said confession, therefore, was not free and voluntary within the meaning of the law. Said confession was not made freely and voluntarily and was extracted from the Defendant in violation of his rights under the Constitutions of the State of Florida and the United States of America.

b) The corpus delicti was not established prior to the introduction in evidence of this extra-judicial confession.

2. A judicial stipulation (attached hereto as Exhibit "A"), wherein the petitioner admitted the crime, was not freely and voluntarily made and therefore improperly in- [fol. 2] troduced into evidence, without objection by his trial counsel.

a) The Petitioner was induced to sign this stipulation or confession upon the assurance and guaranty of one of his attorneys that he would receive a maximum penalty of life imprisonment.

b) The Assistant State Attorney handling the case was present when Petitioner's trial counsel made the aforesaid commitment regarding the maximum sentence, and by his silence, the State Attorney gave his tacit approval to the stipulation and the conditions under which it was to be signed.

c) The Petitioner did not realize, and the Trial Court did not advise him prior to the introduction into evidence of the stipulation, that he was presumed innocent, that he need not incriminate himself with a judicial confession, and that he was subjecting himself to the death penalty by entering into the judicial confession.

3. Petitioner's arrest, detention, pre-trial proceedings, and trial, received widespread adverse publicity by newspapers, radio and television, including broadcasts and telecast of taperecorded confessions made by the Petitioner to law enforcement agencies, to such an extent that such publicity prevented the selection of a fair and impartial jury on the question of whether the jury would recommend mercy for Petitioner in their verdict.

4. Remarks made by the State Attorney (attached hereto as Exhibit "B") in his closing argument to the jury were highly inflammatory and prejudicial to the extent that such remarks prevented the Defendant from having a fair trial on the question of whether the jury would recommend mercy in their verdict.

5. The death penalty provided in Florida Statute 782.04, under which the Defendant was convicted and sentenced, is unconstitutional in that such penalty constitutes cruel and [fol. 3] unusual punishment to a 17-year old Defendant.

6. Trial counsel for the Petitioner, without authority from the Petitioner, or other justification;

a) Refused to ask the Court for a change of venue though requested to do so by the Petitioner.

b) Refused to ask the Court to apply Federal laws of Due Process when they allowed his extra-judicial confession to be introduced into evidence without objection.

c) Refused to assign as error in their motion for a new trial, and in their subsequent appeal, the breach of the agreement which was represented to the Petitioner by his trial counsel as having been reached with the State Attorney regarding the mitigation of sentence, or in the alternative, his trial counsel advised the Petitioner as to an agreement with the State Attorney relative to sentencing which was in fact non-existent.

d) Refused to present testimony of available Court appointed psychiatrist who had examined the Petitioner as to Petitioner's disturbed mental condition; the absence of which prevented the Petitioner from having a fair trial on the question of whether the jury would recommend mercy in their verdict.

7. The constitutional rights which were waived by Petitioner's counsel through error of omission and commission

constitutes a denial of due process and right to counsel, but do not constitute an intentional relinquishment or abandonment of such rights or privileges by your Petitioner, because at the time of trial he did not understand and know what protections were offered him by the Federal and State Constitutions.

Wherefore, Petitioner prays:

1) That he be granted a hearing to present testimony [fol. 4] upon the matter herein contained.

2) That at the conclusion of said hearing, he be granted a new trial.

3) That this Honorable Court grant him a stay of execution pending the determination of this Motion.

Tobias Simon and Howard Dixon,
Attorneys for Petitioner,
c/o Florida Civil Liberties Union,
223 Southeast First Street,
Miami, Florida. By Tobias Simon.

Richard Kanner, Of Counsel, 1390 N. W. 14th Avenue, Miami, Florida.

Certificate of service omitted in printing.

Exhibits attached to this petition found in this record, pages 420-425, are omitted.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

Criminal

No. 1991

[Title omitted]

ORDER ON PETITION FOR RELIEF UNDER RULE No. 1—January 8, 1965

The defendant has filed through counsel a Motion for Relief under Criminal Procedure Rule No. 1 adopted by the Supreme Court of Florida effective April 1, 1963.

A consideration of this Motion reveals that it does not show conclusively that the movant is not entitled to relief.

It is therefore Considered, Ordered and Adjudged:

1. That the State Attorney of the Eleventh Judicial Circuit of the State of Florida is directed to reply in duplicate to said motion within thirty (30) days from the date of this Order and that he attach to his reply a copy of the Indictment or Information in this cause, copy of the bench docket relating to this cause and a copy of the final judgment entered in this cause.

2. The Clerk of this Court is, upon request of the State Attorney, directed to furnish to the State Attorney the above-mentioned records of the Court in duplicate.

3. Upon a consideration of the reply to said Motion the Court will determine whether or not a further hearing or the production of the prisoner is required.

4. The Clerk of this Court is directed to forthwith deliver a copy of this Order to the defendant and deliver a copy of this Order to the State Attorney together with a copy of the Motion and make a return thereof on this Order.

Done and Ordered the 8th day of January, A. D. 1965.

Harold E. Vann, Circuit Judge.

Certificate of Service—Omitted in printing.

[fol. 12]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

Criminal—No. 1991

[Title omitted]

REPLY TO DEFENDANT'S MOTION FOR RELIEF UNDER CRIMINAL PROCEDURE RULE No. 1—Filed February 3, 1965

Comes now the State of Florida, by and through Richard E. Gerstein, State Attorney of the Eleventh Judicial Circuit of Florida, in and for Dade County, and in reply to the motion for relief filed herein under Criminal Procedure Rule No. 1, says as follows:

1. The State of Florida denies each and every allegation of the said motion for relief.

2. That the defendant has not been denied due process of law.

3. That the defendant was indicted by the Grand Jury for murder in the first degree, and was tried by a jury on June 28, 1960. The jury found the defendant guilty, with no recommendation of mercy, and the trial judge prescribed the supreme penalty. All of these facts are evidenced by certified copies of the indictment, the jury verdict, and the final judgment, which are attached hereto and made a part hereof.

4. That the defendant was represented by Court appointed attorneys, Edward Swan and Mitchell Goldman, members in good standing of the Florida Bar, who at the time of the appointment to represent the defendant were highly experienced in the defense of criminal cases, and that they represented the defendant during all proceedings which took place subsequent to the return of the above-mentioned indictment, as evidence by a copy of the minute

[fol. 13] entries of this Court relating to this cause, which is attached hereto and made a part hereof.

5. That subsequent to his conviction, the defendant instituted an appeal and on September 6, 1961, the judgment and sentence of this Court were affirmed by the Supreme Court of Florida. *Whitney* v. *State,* (Fla.), 132 So.2d 599.

6. Subsequent to said appeal, the defendant filed a post conviction petition for a writ of habeas corpus with the Supreme Court of Florida, and in that petition the defendant raised the same factual issues he is attempting to raise in the motion for relief now pending before this Court..

In order to afford the defendant a full and complete hearing on the issues raised by the said petition for a writ of habeas corpus, the Supreme Court of Florida appointed the Honorable Lamar Warren, one of the Judges of the Fifteenth Judicial Circuit, as a commissioner of the Supreme Court to receive the evidence and to submit his findings and recommendations to the Court.

After hearing lengthy testimony of the defendant and his aforementioned counsel and other witnesses, Judge Warren filed with the Supreme Court of Florida, his review of the said testimony, as well as his findings and recommendations. A certified copy of this report is attached hereto and made a part hereof as if set out in full.

7. That the Supreme Court of Florida accepted the findings of Judge Warren, all of which were adverse to the defendant's contentions, and discharged the said writ of habeas corpus. *Whitney* v. *Cochran,* (Fla.), 152 So. 2d 727.

8. That the Supreme Court of Florida's judgment of affirmance in *Whitney* v. *State,* 132 So. 2d 599, and its judgment quashing the writ of habeas corpus in *Whitney* v. *Cochran,* (Fla.), 152 So. 2d 727, are res adjudicata as to all issues raised by the defendant in his motion for relief under Criminal Procedure Rule No. 1.

[fol. 14] 9. That the defendant's motion for relief is frivolous and a sham, as evidenced by the following statement of the Supreme Court of Florida in the above cited case of *Whitney* v. *Cochran*, (Fla.), 152 So. 2d at page 730:

> "After all is said the record in this proceeding simply reveals the case of a totally wanton and unjustifiable murder. A thorough consideration of the matter leads us to conclude that the allegations of the petition have not been sustained; that *in the original trial and in this proceeding the petitioner has been accorded a full measure of due process.*" (Emphasis supplied.)

Wherefore, the State of Florida prays that this Court will enter its order denying the defendant's motion for relief filed under Criminal Procedure Rule No. 1 as being without merit.

Richard E. Gerstein, State Attorney. By /s/ Joseph Durant, Assistant State Attorney, Counsel for Plaintiff.

Certificate of Service Omitted in printing.

Exhibits attached to the state's reply found in this record, pages 429-440, are omitted.

[fol. 25] ATTACHMENT TO REPLY

To: CT for final disposition. 1/17/63 BKR

IN THE SUPREME COURT OF FLORIDA

January Term, A. D. 1962

Case No 31,516 Habeas Corpus

DENNIS MANAFORD WHITNEY, Petitioner,

vs.

H. G. COCHRAN, JR., Director, Division of Corrections, Respondent.

Allow petition until Nov. 5, 1962 to file brief in support of his petition notwithstanding this report. Allow respondent 10 days from service of brief to answer and petitioner 10 days from service of respondent's brief to file reply brief.

BKR, C.J.

Petition for writ of habeas corpus was filed by Dennis Manaford Whitney in the Supreme Court of Florida, followed by an amendment thereto. The writ issued, and the respondent filed his return.

The undersigned circuit judge was appointed a commissioner of the Court to receive such evidence as might be offered to support the petition for writ of habeas corpus and the respondent's return thereto, and to cause the testimony to be duly transcribed and reported to the Court, together with findings and recommendations: now, having received and considered the evidence, having heard the argument of counsel and having considered the memorandums of law submitted by the parties, and at the request of counsel having obtained from the Court and examined and considered the original transcript of the record on

appeal from the circuit court of Dade County, Florida, I do report my findings and recommendations as follows:

The petitioner in his petition asserts, essentially, that [fol. 26] the judgment and sentence to death entered by the court below is illegal and excessive and deprives petitioner of the equal protection of the law as required by Sections 1, 11 and 12, Declaration of Rights, Constitution of the State of Florida, and by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America, his constitutional rights being violated, in that (a) at the time of the commission of the crime he was seventeen years of age, of limited education, and at the time of trial ignorant of legal procedure and of his constitutional rights; (b) that in his ignorance and under the advice of his court appointed attorneys signed a stipulation, allegedly setting forth a true account of the crime alleged; (c) that he was induced into signing the stipulation by one of his attorneys upon the assurance and guarantee that the worst penalty he could get would be life imprisonment, being advised that if he did not sign there was no question but that he would get the death penalty; accordingly, petitioner had a choice of life or death in signing said stipulation; (d) that he did not know that the State was still demanding the death penalty after the execution of the stipulation until he heard the improper and highly prejudicial remarks of the prosecutors in their summation to the jury; (e) that after entry of judgment and sentence his attorneys advised him that a full appeal would be perfected wherein all the procedures and events occurring before the trial court would be reviewed; (f) that during the appellate procedure he was confined to jail and was not consulted with, nor given copies of the assignment of errors or briefs filed; (g) that the effect of the stipulation being placed in evidence by the State, without any benefit going to peti- [fol. 27] tioner in the form of a penalty less than death, was to deprive him of his constitutional right to be confronted with the witnesses against him and thereby his right to

cross examine them; said stipulation had the further effect of compelling him to be a witness against himself on the State's side of the case; (h) that the prejudicial and improper remarks of the prosecutor, made after he had entered into the stipulation under the misconception mentioned, denied him his inalienable rights to defend his life and obtain safety; (i) that said stipulation and improper remarks of the prosecutor deprived him of his right to an impartial jury and has placed him in the position of losing his life without due process of law; (j) that all of the above mentioned facts constitute a deprivation of his right to the equal protection of the law. He further alleges that the stipulation contains an error and is misleading; that the stipulation was permitted to be taken into the jury room, thus putting undue emphasis on a portion of the evidence; and that F.S. §782.04, upon which the judgment and sentence is based is unconstitutional in that it fails to limit the class or age group of persons subject to violating its provisions.

The respondent's return to the writ in substance alleged that said stipulation was placed in evidence as State's Exhibit 1 (Appeal record, page 166), and the petitioner testified at his trial that everything in it was the truth (Appeal record, page 188); that said stipulation was entered into by the petitioner because he was correctly informed that the State had ample evidence to prove the statements made therein and had felt a conciousness of guilt and hoped [fol. 28] by frankly admitting the facts stated therein, he would have a better chance to receive a recommendation of mercy from the trial jury.

The respondent denied that the petitioner was induced to sign said stipulation by one of his attorneys upon the assurance and/or guarantee that the worst penalty the petitioner could get would be life imprisonment; denied that the petitioner was advised that if he did not sign said stipulation, there was no question but that he would get the death penalty; and denied that the petitioner had a choice of life or death in signing said stipulation.

The respondent alleged that the remarks, set forth in the exhibit to the petition, were taken from the appeal record out of context and did not exhibit the true tenor and effect of the State's arguments to the jury, the more so because the State's arguments could not be properly and fairly considered and evaluated except in the light of the arguments which had been made previously by defense counsel; denied that the arguments in the exhibit were improper or prejudicial; that whether the remarks were improper or prejudicial was not a question which might be properly raised in habeas corpus proceedings; that whether said remarks were improper and prejudicial was res adjudicata, the Court having decided against the petitioner as to those of said remarks which were challenged on appeal; and as to those which were not challenged, they might have been challenged and therefore the Court's judgment of affirmance was res adjudicata also as to them.

The respondent denied that after the entry of judgment and sentence the petitioner's attorneys advised the peti- [fol. 29] tioner that all of the procedures and events occurring before the trial court would be reviewed on appeal.

The respondent alleged that the error in the stipulation was inconsequential in the light of the entire stipulation, and, that the point was waived by failure to raise it on appeal.

The respondent alleged that, as to the stipulation being taken into the jury room, the point was not available in these proceedings; that the petitioner made no objection at the time the trial court granted permission to the jury to take the stipulation into the jury room; that by failing to raise the question on appeal, the petitioner waived it; that even though the question was not raised, the Court's judgment of affirmance was res adjudicata as to said question; and that it was in accordance with law for the trial court to permit the jurors to take the stipulation into the jury room pursuant to F.S. § 919.04(3).

The respondent denied that F.S. § 782.04 was unconstitutional.

In the brief of the petitioner, the point involved was stated to be:

> SHOULD AN INEXPERIENCED, IMMATURE, SEVENTEEN YEAR OLD BE ELECTROCUTED BECAUSE OF A STIPULATION HE ENTERED INTO UNDER THE MISAPPREHENSION THAT HIS LIFE WOULD BE SPARED?

The first witness called by the petitioner, Mrs. Juanita Trevino, a sister, who resides in California, testified that it took an hour or more to impanel the jury (T.12); that at a conference following the selection of the jury, when Mr. Swan and Mr. Goldman [the court-appointed attorneys] and the petitioner were present, the following transpired: "Well, they were telling us what course they would [fol. 30] take, and all they had was this stipulation, that this was Dennis's only chance and other than that they had no defense, and it had been discussed through the prosecuting attorney and an agreement made with the prosecuting attorney that there would be no definite statements as exhibits and this would eliminate all the witnesses, it would dissolve the trial out from eighteen days to ten days, or else he would have no chance whatsoever, and it said that Dennis had agreed to the stipulation, and they would like this to be heard in our defense" (T.13); that, specifically, it was said, "Well, he said that without signing it there was no chance at all, and that with signing it that it was agreed with the prosecuting attorney that he would not ask for the death penalty and it was felt with them when it was not asked for the death penalty that that was the best thing to do" (T.14); that, "If it was signed there would be no witnesses. That they would be eliminated" (T.14); that, "Well, they said it would do away with all the gory pictures, and evidence that they had, and the stipulation was that it would be all shot, the effect" (T.15); as to the effect without the stipulation, "That there was just not any chance for him without it, that it was definite that he would get the death penalty without

this stipulation, that the prosecution had such a great amount of evidence and exhibits that there would be no chance for him, that this was their only defense, and my sister and I looked at each other, and there didn't seem to be any way out" (T.15); that, "At the time that he [Mr. Swan] told me this, he said it would go for eight or ten days, and would tear Dennis apart and 'You don't want all that evidence shown and go through all that, isn't that right?'" (T.16).

[fol. 31] In reply to the question whether her brother had been taken before the presiding judge and had the stipulation explained to him in the judge's presence, she stated, "To my knowledge there was no such suggestion" (T.18).

On cross examination, the witness was shown that it took from 9:30 in the morning until 2:40 in the afternoon to select the jury, instead of one hour (T.18). Replying to the question whether Mr. Swan went into the matter of capital punishment with the prospective jurors, she stated, "I guess he did"; and whether she knew that was the big issue, she stated, "Yes, it was bound to be" (T.20-21). Upon being questioned whether she made any point about the attorneys permitting the State to ask for the death penalty, she replied, "No, the thing was done" (T.22).

And on redirect examination, with regard to the discussion of capital punishment with the jury, the witness recalled that the stipulation had been entered into after the jury was picked. (T.24).

The petitioner, Dennis Manaford Whitney, was next called as a witness, and in relating the first mention of the stipulation, he testified, "I sat down at the table with Mr. Swan, and he had these papers on the desk and he showed them to me and asked me to read them and I read them and he seemed to be relating the crime I had been charged with, and he explained to me that it was a stipulation that they were thinking of entering into with the State. He told me that the Judge said he would not accept a guilty plea but that he might accept a stipulation and he asked

me what I thought of it, and I told him I thought it was worded a little harshly, I objected to the wording of it, and I told him that some of it was worded falsely, and he [fol. 32] said he didn't know about the wording, and he would take it to the State Attorney's office about the wording, but he proceeded to explain to me the meaning of the stipulation. He told me that the State had a pile of evidence against me, that the State had some thirty or thirty-five witnesses they would send against me, and he started to name some of the witnesses, he said they would have Mr. Keeler's widow there, some of the arresting officers, and then he told me they would have a sailor who was supposed to be at the station at the same time that I was. I told him there was nobody at the station, that I had never seen any sailor before and he said, 'Well, the sailor says different,' and they were going to put him on the stand. He told me that they might bring in a man named Beecher, that they would bring him in on a stretcher and it would look very bad for me, and he went on to relate what evidence the State would have, and he told me with all this he had no defense at all to offer, that there was no hope at all but that I would positively get the electric chair if we went to trial this way, but maintaining on the other hand that if I stipulated and agreed, the State would agree to do away with all these witnesses except for one, they would put on the arresting officer to identify me and identify two pictures" (T.32-33). Replying to the question whether there was a deputy sheriff in the room also, he stated, "Outside there was. He told me that he had stipulated to agree to do away with all the other witnesses, with the exception that they would introduce one arresting officer to identify me with the pictures, they'd introduce the gun, and they would introduce two black and white pictures. He told me that they had a bunch of big blown up gory pictures that were real bad and would really hurt me, that if I stipulated they would just use two pictures that [fol. 33] weren't bloody and everything, they would just

show the station, the scene of the crime, and that's all that would be introduced, he told me it would reduce the emotional effect of the trial and it would cut down on the time and he said, 'You won't get the chair', he said I would get a life sentence, he said I couldn't expect anything less than a life sentence. I told him that I didn't expect anything less than a life sentence, that a life sentence was all I wanted" (T.33-34).

With reference to the effect that the widow's testimony might have on the jury, the petitioner testified, "[Mr. Swan] said it would be very emotional, that the widow would probably get up there and cry and that they would bring in this Beecher on a stretcher, and said it would really turn the jury against me, he said with this stipulation that there would be no emotion, it would be in black and white for the jury to read, and there would be nothing else for them to consider" (T.35).

He further testified that Mr. Swan came back and told him that there would definitely be a change in the wording (T.36); that while the jury was being selected, it looked like there was going to be a full scale trial on all issues (T.41); that at the conference with regard to the stipulation, Mr. Goldman "was explaining to them about the stipulation, that if I agreed to the stipulation he explained to them how it would do away with the evidence and that it was my only hope because the State had too much of a case against me otherwise, we had got no defense to offer, and he said they were considering putting my sisters on the stand, that they hadn't decided on that yet, but they were considering that, and one of my sisters turned to me like to ask me about it, and Mr. Goldman told [fol. 34] her he thought it should be decided with or without my consent, that it should be decided between my sister and my attorneys" (T.42). Further, that [the attorneys] "mentioned that it would eliminate all the evidence, the witnesses and the emotions of the trial, that it would cut down the time of the trial, and without the stipulation I had absolutely no hope and I would get the chair" (T.42);

as to what he would gain by signing the stipulation, he stated, "Well, at this conference during the recess, I remember it was said that I would definitely get the death penalty if I stood trial, and said that if I stipulated the State wouldn't stress so much the death penalty, wouldn't ask for it and the chances were that I wouldn't get it, and they mentioned the possibility of my sisters being witnesses but they never did" (T.43); that this was the definite understanding that he had at the time of signing the stipulation that the State would not ask for the death penalty, and that he would not have signed it if he had known the State was going to ask for the death penalty (T.44); that he first became aware of the fact that the State was asking for the death penalty during the closing argument (T.46).

The petitioner further testified he pointed out to Mr. Swan that part of the stipulation that Mr. Keeler at no time at all either threatened or endangered petitioner with a weapon wasn't true, that Mr. Keeler did have a weapon on him (T.46-47); that during the trial they played a record or disc that was supposed to be a recorded confession that conflicted with the stipulation, and that when he raised this question, Mr. Swan said it was a minor thing, considering all they gained by the stipulation, and that the State definitely would not change it; that the prosecutor very strongly pointed out the discrepancy, [fol. 35] making it appear that he was telling a lie in the record and he was made to come forth and tell the truth in the stipulation (T.47-49).

Further, that when the verdict came, his attorneys told him not to worry, that everything would be all right, they would appeal it all the way; that he was stunned. (T.49-50).

Whitney testified that when he wrote Mr. Swan, inquiring about an appeal, he wrote petitioner a letter outlining the appeal points that he raised, and said there were others (T.51); that Mr. Swan sent him a copy of their brief after it had been filed in the Court and sent him a copy of the State's reply brief after the oral argument, re-

questing him to read them and send them back as soon as he could (T.52); that he received a letter from Mr. Swan about two or three days before telling him that they would be going up to argue the case (T.52); the fact that he entered into the stipulation and he wouldn't have to get the death penalty was not raised in the appeal that he could recall (T.533-54); that certain factual remarks made by the prosecutor during the course of argument were not contained in the stipulation or in the oral confession (T.54-55).

In summing up his reasons for signing the stipulation, he stated, "I signed the stipulation because I was sure that it would give me a life sentence, which was all I expected to ever get and seemed as if it was the only choice I had, that if I didn't sign it I would get the death penalty, there was no question but that I would get the death penalty if I didn't sign it. I signed it with the understanding that I would get a life sentence, but aside from my dislike of the wording of it I agreed to it" (T.56).

He stated that he has since (the trial) found out that [fol. 36] he waived some of his constitutional right by entering into the stipulation; that at the time of the trial he was seventeen (T.57); that he had been able to further his education in the past two years, reading extensively, reading some briefs and opinions (T.58), that he knew nothing of legal matters in 1960, and that he could speak a little bit better now (T.59).

On cross examination, he stated that since he had been in Raiford he had corresponded considerably with Mr. Swan (T.60); that he respected Mr. Swan and Judge Goldman (T.61); that he prepared drawings for them and forwarded them (T.61-62); that he may have written letters to Mr. Swan point by point going over the briefs and citing other cases that he had heard of, and that it was untrue in the affidavit which was presented to the Supreme Court that he was never informed as to what was happening in his behalf as to the briefs (T.64); that he set forth in a letter, suggestions, but that was after it had been filed

(T.65); that he wrote a number of letters expressing his gratitude to Mr. Swan and to Judge Goldman for their services to him (T.67-74).

He further stated that Sergeant Lynch was with him all during the trial, and he supposed he was in position to hear exactly what was said (T.75); that he didn't recall that Judge Goldman and Mr. Swan came to see him as often as two or three times a week (T.75, 82); that he first heard about the stipulation ten days to a week before the trial, and that Mr. Swan was the one that introduced him to it (T.70).

In reply to the question whether his attorneys told him that there was no question about his guilt, that he had admitted his guilt to them, he had admitted his guilt with television cameras going and recording equipment going, [fol. 37] he had admitted his guilt with newspaper reporters present, with detectives present, with stenographers present and that they had an obligation to defend him and that the only thing they could hope for was to save him from the electric chair, the petitioner answered, "Yes, sir, and that's all I wanted was to be saved from the electric chair" (T.84); that he didn't know the State was going to demand the electric chair after he signed the stipulation; that, "well the reason I understood by signing the stipulation they wouldn't have to give me the death penalty was the reason I signed it" (T.85); that he made no outcry and objection when they started arguing and demanding the electric chair because he didn't know he could get up and yell, he thought it would be disorderly; he thought it would be his attorneys' duty to get up and say something if something was wrong; in the letters he wrote, while he was thanking them, he never mentioned that they double-crossed him because they were the only attorneys he had; he couldn't go along criticizing them. (T.85-86).

Answering whether he didn't know and wasn't he told by his lawyers that since only a bare minimum to satisfy the Supreme Court was going to be presented, the one and only thing that was going to be argued to the jury was

whether he was going to the electric chair, he said, "No, sir. That isn't all they told me" (T.86-89). And replying to whether he was told by his lawyers that the State had such a preponderance of evidence that it was overwhelming and that they couldn't help but get a conviction and that he would surely go to the electric chair if they presented all their evidence, he said, "That is right, sir" (T.91). He had no idea why the State wanted to enter into the stipulation, all he knew was why he did (T.92).

[fol. 38] In reply to the question what he told his attorney, he stated, "I told them that I had my gun on him and I told him to go into the station. He asked me if I wanted him to open the cash register. I told him 'No, just step back into the rest room and I would open the cash register.' He got to the rest room and suddenly he turned around with his hand in his pocket and he started to say something and his sudden action caused me to shoot him on impulse" (T.96). He said that the stipulation was misleading where it said that at no time did Keeler threaten and endanger him with any weapon whatsoever, because he thought he was pulling a gun on the witness.

As to the briefs, the petitioner stated he didn't have time to study them; he had time to read them quick, make notes and send them right back; that in his letters he made reference to a couple of other cases (T.99).

He said that by signing this stipulation and agreeing to it, he thought he was made to testify against himself unwillingly (T.101); that Judge Goldman told him the final decision was his to make whether he wanted to sign it or not (T.103); he signed it, the decision was his, but it was because they thought it would be best (T.104); had his lawyers recommended a guilty plea, he would have followed the advice of his attorneys in whatever was happening (T.104-105).

The matter he wanted to discuss with his attorneys, when he wrote them to visit him in Raiford, was the possibility of certiorari, or going before the pardon board and raising any other and possible points that they missed before; the

possibility of what the jury deliberated on, the possibilities [fol. 39] of the stipulation, how it was introduced, and his rights violated there; he didn't discuss these things in his letter because he wanted to discuss it, talk it out fully; it was very hard to do things in letters; that in none of his letters did he complain to Mr. Swan or to Judge Goldman about the stipulation (T.105-109).

The first witness for the State, Mitchell M. Goldman (one of petitioner's court appointed attorneys), after relating his education, service background, and legal affiliations (T. 109-111), testified to his first conference with the petitioner, on May 20, 1960, the day they were appointed, which took from two to three hours, and of Whitney's statements to him (T.113-123); that Whitney told him that he stopped at a gas station and used the restroom and he noticed one man, so he decided to rob him too, that he left the restroom and the man was sitting there, and he told him this was a stickup and told him to get inside, told the man to go to the restroom and he started to go—started to walk while Whitney had his gun on him, that the man turned toward Whitney and then he shot him (T.120-121); that prior to trial [June 27, 1960] either Mr. Swan or himself would communicate with Whitney on an average of two to three times a week and sometimes more (T.124, 125); that they examined the State's evidence, which included petitioner's possessions, a gun, magazines, clothing, an autopsy report, a bullet, and a number of photographs (T.125, 126). They further found that not only was there a Gray Audiograph confession, but that each of the three local television stations in Miami had sound taped films of Whitney's confession, and they knew that a majority of the radio stations in [fol. 40] Miami had taken sound recordings or direct interviews with him where he had confessed these various killings; there were pictures, television photographs, or tapes of him being interviewed by the sheriff's office; they were advised there were close to fifty witnesses, and a witness, who was driving into the gas station at the time petitioner was leaving, with gun in hand, a surprise witness;

that there was no question in their minds, after discussion and research, that the cards were stacked against them (T.126-127); that Mr. Swan came up with the suggestion of the stipulation, which they discussed with Whitney several times before trial, and they told him in view of the evidence there was no possible chance of him beating the case (T.128-129); that the stipulation was later discussed with Whitney, his sisters and brother, and Mr. Swan, when a Sergeant Lynch was present, at which time he addressed himself to the whole group, laying the facts on the table, the facts being that they were up against some fifty odd witnesses (T.130-132); that he did not tell anyone that the stipulation was a guarantee to save his life, but he told him that the State was going to demand the chair; this was the decision that Mr. Swan and he had made, they felt that it would be the best thing, and they were going to relate their feelings to Whitney and his sisters; they told them that by his signing it was tantamount to a plea of guilty, that he was confessing that he did shoot and kill and rob Keeler; "I said, it was most important that he understood this. It was a confession" (T.133). They left the decision to Whitney and his entire family; they told him that if they put his sisters on or any other testimony, they would waive their rights to closing argument; that he was going to confine his [fol. 41] examination to Whitney's background of dislike for his father, and so forth, to attempt to impassion the jury to give them a recommendation of mercy (T.134-135).

The first time he heard about any objection to the stipulation by the defendant was when he heard about it in the newspaper; Whitney never complained, but said, after the conviction, that even though they didn't make it, he still thought it was the best thing (T.135).

On cross examination, the witness corrected himself to say that the first time he heard about it was by a communication from Mr. Nugent, that Whitney was going to try to appeal to the Federal court for a writ based on the stipulation, but as to the writ being filed, he knew nothing until he read it in the papers (T.136-137). During the voir

dire examination of the jurors, there were questions asked about the electric chair, but at that point the stipulation had not been entered. There was still some question as to whether Mr. Swan and he thought that they would do it. (T.137). The advisability of taking Whitney before the judge for approval of the stipulation was not discussed (T.138). It was his and Mr. Swan's opinion that it was to Whitney's best interest to sign the stipulation; that impression was given to Whitney and his sisters; if he had to try it again, he would do it the same way; they considered the possibility of error being committed, but they figured there were approximately eight confessions, and with all of them, if there was error in one, it would be cured in another along the line with some fifty odd witnesses (T.139-140). The fact that the State entered into the stipulation precluded the State from making any argument at all to the jury, and that point was assigned as error and argued on appeal (T.141). When the State entered into the stipula-[fol. 42] tion, he knew they were going to ask for capital punishment; the State had told them that unequivocally (T.141). The sisters evidenced to him that they understood the stipulation and thought that it was the best thing for Whitney (T.142).

They went into this thing [signing] in great detail and talked to Whitney for hours, over a period of time; they explained the advantages and disadvantages of a trial. Whitney evidenced he did not want to sit through the whole thing. He was meaning the one that he had in Palm Beach; he said, "I can't stand another one of those." They told him the widow was listed as a witness, and would probably testify against him (T.142-144).

After reading the opinion of the Supreme Court he felt that a petition for rehearing would be of no use (T.147).

The State next produced Sergeant Ronald Lynch, of the homicide division of Dade County, who testified he had a business degree and a law degree from the University of Miami (T.151); that on the first day of the trial he was inside an anteroom with Whitney, another detective, Mr.

Goldman and Mr. Swan, and Whitney's two sisters; that, "At this time, Mr. Goldman explained to the defendant, Dennis Whitney, the effect of the stipulation, in which, he Dennis Whitney, would admit, basically, all the basic facts to the crime for which he was being tried. He advised him, at this time, that the only thing this stipulation would do to help to prevent the State from putting on many, many witnesses and going into all the gory details of the crime. He advised him that this was strictly something that had to be done completely and voluntarily on his part and that it was his decision to make. He also advised him that regardless of which way he chose to go, by him signing the stipulation or not, that both he and Mr. Swan would still do everything within their power to see to it that Dennis [fol. 43] did get a fair and impartial trial" (T.153). In reply to the question whether at any time, during that interview, did either Mr. Swan or Judge Goldman tell Whitney that if he signed the stipulation that it would save him from the electric chair, he stated, "No, Sir. In fact, the actual outcome of the trial was never entered into the conversation. The only reason they gave for it was the fact that it would stop the State from putting on a mass of witnesses, who would go into great detail of the crime" (T.153-154).

On cross examination, the witness stated he stayed with Whitney; that the only statement Whitney made was after the verdict, that Whitney did not appear to be reasonably assured that he was not going to get the death penalty during the jury deliberation; that the statement Whitney made, after taking him from the courtroom and en route to the jail, was, "I guess I got what I deserved" (T.154-155).

The next witness was Edward P. Swan, the other court-appointed attorney, and he testified as to his educational, service, and civic background, and his legal affiliations and activities (T.156-159). He further stated that when he was in the courthouse, he went up to see Whitney two to four times a week (T.161); he had discussed the stipulation with Whitney many times prior to trial, and at trial they discussed it again, in the little jury room (T.161). Whitney

had advised him that he did not want to hear any of the gory details that he had to in West Palm Beach, and if at all possible to keep something like this from taking place; that the witness had been working with the State to see if he could work out a possible stipulation; that, "We went over it in detail, I mean he [Whitney] read it again at the counsel table and then read it again in the juryroom. Prior to that, he knew what the State was trying to put into it [fol. 44] when I was, that is, Mr. Goldman and I were trying to knock out of it. He knew step by step what was to be put in there" (T.162-163). The witness related that "We got Dennis and he read the stipulation again with us. We went over each thing with him. There was no question of his being guilty of first degree murder. Then, came the proposition that this would be the best thing to do to keep out the gory details and everything. We again explained to him that this was the only issue, therefore, after the stipulation, and we had agreed to with the State on other documentary evidence such as photographs. The only issue for the jury would be whether or not they would recommend mercy. This had been going on for months." (T.163). There was no question that he agreed to sign with that understanding (T.164). None of them ever told Whitney that if he signed that that was a guarantee he would not go to the electric chair (T.164). The witness sent Whitney the briefs to go over, and Whitney sent him letters outlining his comments, and the witness received two letters from his sister (T.164).

On cross examination, the witness stated that there was no question about his being of the opinion that the stipulation was for Whitney's best interest (T.166). They felt that it was a trial tactic; they had a great many problems. If it had gone to the witnesses—they were loaded because he had fully investigated the case. He told all the family to read the stipulation and then talk to Whitney, and they talked to him, but the final decision on the stipulation was Whitney's (T.167).

The first objection that he heard to the stipulation was when a newspaper reporter called him after the petition went to the Supreme Court; there was never any objection at all to the stipulation all along the line (T.168).

Whether or not he ever told him that they would go in [fol.45] front of the judge to have him explain it, he didn't know. He fully understood. Whitney was smart; he had a good head on him; he fully understood (T.168). There wasn't any question in his mind that the only issue to be tried in the case after the stipulation was signed was whether or not the jury was going to recommend mercy (T.169). As to whether or not the Audiograph disc version varied with the stipulation, with reference to whether or not there was any movement by Keeler in the direction of Whitney before the shooting, the witness testified that there might have been, that he went into all that with Whitney on the first interview because he thought maybe there was a possible chance of self-defense, but later on, the boy told him that that wasn't true, which knocked him out of a possible plea of self-defense (T.171-182). As to whether Whitney raised any question about the inaccuracy of a portion of the stipulation and the witness stating that "Considering the benefit you are getting from it, don't worry about the wording," the witness answered, "No, sir. Every word had to be right in that stipulation or I would not have let the boy sign it, because I was dealing with the boy. He read everything. There were no ifs, ands, or buts, and that statement was not made, Mr. Nugent."

In an examination of the original transcript of the record on appeal from the circuit court of Dade County, it was observed that Mr. Swan, in his opening argument to the jury, at the conclusion of the trial in the lower court, stated that this was the opportunity to talk about the facts and the [fol. 46] law, and in this case, the mercy aspect of this defendant (TR. 196); that they didn't feel any jury would be cold hearted enough to send this boy to the chair (TR. 197); that pleading for mercy was a difficult proposition (TR. 198); that what they were begging for was his life

(TR. 200); that going to the electric chair was the worst thing that could happen to anyone, that he was asking that this boy spend the rest of his life in jail (TR. 201); that he didn't know what the State was going to do after he sat down, whether they were going to scream for the electric chair (TR. 202); that the State, by the stipulation, came into court with them agreeing that they had a conviction of first degree murder; there was no question about it (TR. 203); he asked that the jury bring back a verdict of guilty of first degree murder with a recommendation of mercy (TR. 208); and he closed his remarks by saying, "We ask mercy at your hands" (TR. 210).

[fol. 47] Finding

As commissioner of the Court, I find as follows:

1. That the petitioner in entering into the stipulation was not under a misapprehension that his life would be spared; that his sisters were not under such misapprehension; and that the testimony of the two court-appointed attorneys shows that the petitioner did not sign the said stipulation under a misapprehension of facts.

The petitioner was fully and adequately advised by his attorneys that the only issue remaining to be tried was the issue of mercy. While petitioner is of somewhat limited education, in many respects he is above average in intelligence. He understood the stipulation and knew the reasons for it. Although petitioner testified that he first became aware that the State was asking for the death penalty during the closing argument, Mr. Swan, one of his attorneys, pleaded for mercy in his opening argument at the close of the evidence. He failed to complain about the stipulation until these proceedings were instituted, and gave no satisfactory reason for not doing so; the decision was his to sign the stipulation.

2. That no rights of the petitioner were violated by not having his rights explained to him by the trial judge with

regard to signing the stipulation; and that the error in the stipulation is inconsequential.

The original transcript of the record on appeal from the circuit court of Dade County, at page 161, shows that, after Mr. Goldman waived opening statement, the jury was excused, and counsel for the State and for the petitioner approached the bench and conferred with the court, evidently soon after the stipulation was agreed upon. The court was apparently satisfied, under all the circumstances, [fol. 48] that it was unnecessary to call the petitioner forward and advise him of his rights. The purpose and effect of the stipulation had been carefully, fairly and in good faith explained to petitioner on several occasions, over a period of several days, and the decision to sign was left up to him. There was no promise by or agreement with the State that it would not ask for the death penalty. Petitioner understood after signing the stipulation that his attorneys were going to plead to the jury for his life. He was not misled or deprived of any right. He was represented by able attorneys.

3. That the statements taken from the stipulation by the prosecution were not twisted and distorted into highly prejudicial and inflammatory remarks.

As to petitioner's statement on the Audiograph disc, played to the jury, that it "looked like he was pulling a gun on me, so I shot him a couple of times," it is observed, from the stipulation, that the first shot "was within powder range of the muzzle of the gun."

4. That the State's argument to the jury was upon reasonable inferences drawn from the evidence.

The Supreme Court decided against the petitioner as to those remarks which were raised on appeal; it also made a comprehensive study of the record. Whitney v. State, Fla., 132 So. 2d 599. He is precluded from challenging them again, or other remarks. Lundon v. Chapman, 9 So. 2d 723; State v. Mayo, 69 So. 2d 307; Fernandez v. Culver, Fla., 98

So. 2d 487; State v. Cochran, Fla., 128 So. 2d 609. Cf. State v. Culver, Fla., 113 So. 2d 383.

5. That petitioner's attorneys adequately prosecuted the appeal to the Supreme Court of Florida.

[fol. 49] 6. That undue emphasis and stress was not placed on the stipulation by permitting the jury to take it into the jury room.

Petitioner had been made aware by his attorneys that the stipulation was to be given to the jury to read; he made no objection at the time it was taken into the jury room; such procedure was in accordance with F.S. §919.04(3).

7. That F.S. §782.04 is not unconstitutional for failing to limit the class or age group of persons subject to violating its provisions.

This section applies to all persons who have the capacity to commit the crimes denounced therein. A seventeen-year old is old enough to have the capacity to violate the statute and therefore he is subject to its provisions.

Recommendation

I recommend that the petitioner be remanded to the custody of the Director of the Division of Corrections.

Respectfully submitted, Lamar Warren, As Commissioner.

[fol. 50] Clerk's certificate to foregoing paper omitted in printing.

[fol. 51]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY

Criminal—No. 1991

THE STATE OF FLORIDA, Plaintiff,

vs.

DENNIS MANAFORD WHITNEY, Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR RELIEF UNDER CRIMINAL PROCEDURE RULE No. 1—Filed February 11, 1965

This Cause came before this Court on defendant's motion for relief filed pursuant to Criminal Procedure Rule No. 1, and having examined the said motion, as well as the reply to the motion filed by the State of Florida, and having examined the records of this cause, it is the findings of this Court as follows:

1. That the defendant was duly tried, convicted and sentenced in the above-numbered case, the cause appealed to the Supreme Court of Florida, and affirmed. *Whitney* v. *State,* (Fla.), 132 So.2d 599.

2. The defendant filed a post conviction petition for writ of habeas corpus with the Supreme Court of Florida and after a full and complete hearing on the factual issues raised by the defendant, the Supreme Court of Florida quashed the writ of habeas corpus. *Whitney* v. *Cochran,* (Fla.), 152 So.2d 727.

3. That the aforementioned decisions of the Supreme Court of Florida are res adjudicata as to all issues raised by the defendant in his motion for relief under Criminal Procedure Rule No. 1.

4. That the files and records of this cause conclusively show that the defendant has been accorded a full measure of due process and is not entitled to the relief sought; and it is, therefore,

Ordered and adjudged that the motion for relief under [fol. 52] Criminal Procedure Rule No. 1 be and the same is hereby denied.

Done and Ordered this 11th day of February, 1965.

Harold R. Vann, Circuit Judge.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

Criminal No. 1991

[Title Omitted]

ASSIGNMENT OF ERROR—Filed March 15, 1965

The Defendant assigns the following errors in this cause:

1) The Court erred in holding prior decisions of the Supreme Court of Florida were res adjudicata as to paragraphs 3 and 6a of the petition which allege that the petitioner was denied a fair trial on the question of whether the jury would recommend mercy, because of excessive prejudicial pretrial publicity.

2) The Court erred in holding prior decisions of the Supreme Court of Florida were res adjudicata as to paragraph 6d of the petition which alleges that the petitioner was denied a fair trial on the question of whether the jury would recommend mercy because petitioner's trial counsel did not present testimony of available Court-appointed psychiatrists who would testify as to the petitioner's disturbed mental condition.

3) The Court erred in holding prior decisions of the Supreme Court of Florida were res adjudicata as to paragraphs 1a and 6b of the petition which allege that the extra-judicial confession was extracted from the petitioner in violation of his right to counsel guaranteed by the Constitutions of the State of Florida and the United States of America.

4) The Court erred in holding prior decisions of the Supreme Court of Florida were res adjudicata as to paragraph 2c of the petition which alleges that the Court had [fol. 54] an obligation, prior to receiving the judicial confession in evidence, to advise the petitioner that he was presumed innocent, that he need not incriminate himself with the confession, and that he was subjecting himself to the death penalty by entering into the judicial confession.

5) The Court erred in holding prior decisions of the Supreme Court of Florida were res adjudicata as to paragraph 4 of the petition which alleges that the petitioner was denied a fair trial on the question of whether the jury would recommend mercy because of the inflammatory and prejudicial closing argument made by the State Attorney.

Richard Kanner, 1390 NW 14th Avenue, Miami, Florida, Attorney for the Defendant.

Certificate of Service Omitted in printing.

[fol. 55] Not Final Until Time Expires To File Rehearing Petition And, If Filed, Disposed of:

IN THE DISTRICT COURT OF APPEAL OF FLORIDA,

THIRD DISTRICT

January Term, A.D. 1966

Case No. 65-401

DENNIS MANAFORD WHITNEY, Appellant,

vs.

STATE OF FLORIDA, Appellee.

OPINION FILED MARCH 8, 1966

An Appeal from the Circuit Court for Dade County, Harold R. Vann, Judge.

Richard Kanner, for appellant.

Earl Faircloth, Attorney General, and James T. Carlisle, Assistant Attorney General, for appellee.

Before HENDRY, C. J., and TILLMAN PEARSON and BARKDULL, JJ.

BARKDULL, Judge.

The appellant in this cause was convicted of first degree murder without a recommendation of mercy and received a capital sentence in accordance therewith. The propriety of this judgment of conviction has been before the courts of this State on several occasions [see: Whitney v. State, Fla. 1961, 132 So.2d 599; Whitney v. Cochran, Fla. 1963, 152 So.2d 727], and was before the Federal courts [see: Whitney v. Wainwright, 5th Cir. 1964, 339 F.2d 275].

Subsequent to the last proceeding in the Federal court, a petition for relief, pursuant to Criminal Procedure Rule

No. 1, was filed in the trial court. Following a response by the State, the trial judge entered an order finding that all matters raised in the petition were res adjudicata because of prior appellate or habeas corpus proceedings. An appeal from this order was taken to the Supreme Court of Florida, pursuant to the provisions of the Florida Con-[fol. 56] stitution lodging jurisdiction in that court to review capital sentences. See: § 4, Art. V, Florida Constitution. Thereafter, following a motion to transfer by the State, the cause was transferred to this court for determination by order of the Supreme Court of Florida.

By his brief, the appellant contends that the court committed error in holding that the prior appellate or habeas corpus proceedings were res adjudicata, this being a criminal matter, and his judgment of conviction is subject to collateral attack for the following reasons: 1. The appellant was denied due process of law on the issue of mercy because of excessive and prejudicial pre-trial publicity. 2. The closing argument of the State Attorney that a verdict with a recommendation of mercy would allow the appellant to be paroled was a denial of due process on the question of mercy. 3. The court cannot accept a guilty plea without first ascertaining from the defendant that he is aware of the consequences of his plea and his constitutional guarantees. 4. The appellant was deprived of a fair trial on the question of mercy, because the jury did not hear defense psychiatric witnesses. 5. Extra-judicial confessions made by the defendant without counsel are inadmissible evidence.

Proceedings under Criminal Procedure Rule No. 1 have been held to be civil. See: State v. Weeks, Fla.1964, 166 So.2d 892; Barton v. State, Fla.App.1965, 176 So.2d 597. Principles of res adjudicata applicable to civil matters would prevent the same issues being raised in a subsequent proceeding if they *actually* were, should have or could have been raised in a prior proceeding. See: Hay v. Salisbury, 92 Fla. 446, 109 So. 617; Tilton v. Horton, 103 Fla. 497, 137 So. 801; 19 Fla.Jur., Judgments and Decrees, § 120. However, res adjudicata in a Criminal Procedure Rule No. 1

matter should be applicable only to those items *actually* raised in the prior proceedings, and not to new grounds. In this connection, see: Johnson v. Lindsey, 89 Fla. 143 So. 419; Washington v. Mayo, Fla.1955, 77 So.2d 620; Piehl v. State, Fla.App.1965, 173 So.2d 723; Weeks v. State, Fla. App.1966, —— So.2d —— [opinion filed January 18, 1966]; Sanders v. United States, 373 U.S. 1, 83 S.Ct. 1068, 10 [fol. 57] L.Ed.2d 148; Burgess v. United States, 9th Cir. 1963, 319 F.2d 345; Hayes v. United States, 5th Cir.1963, 323 F.2d 954.

It appears that reasons numbers 2 and 3, raised in the appellant's brief, were before the Supreme Court of Florida in the prior habeas corpus proceedings. See: Whitney v. Cochran, supra. Therefore, so much of the trial judge's order which denied relief on these grounds, upon the doctrine of res adjudicata, is hereby affirmed. As to the other reasons [numbers 1, 4 and 5], even though the trial judge may have denied relief upon the wrong principle, it appears that his decision was correct, as will be hereinafter discussed, and therefore, under the doctrine that even if the wrong reasons were given the right result is obtained, the order here under review should be affirmed. See: Savage v. State, Fla.App.1963, 156 So.2d 566; Gaines v. State, Fla. App.1965, 172 So.2d 887.

Turning to reasons 1, 4 and 5, which were *first* raised in the petition, these are not appropriately the subject matter of a collateral attack.

As to the first reason, lack of due process of law because of excessive publicity, see: Simpson v. State, Fla.App.1964, 165 So.2d 195; Sheppard v. Maxwell, 6th Cir.1965, 346 F.2d 707. No motion for change of venue was made, nor were the peremptory challenges exhausted in the case sub judice. Therefore, the cases relied upon by the appellant [see: Irving v. Dowd, 360 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2nd 751; Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663] are not applicable.

As to the fourth reason, failure of counsel to call witnesses, see: Simpson v. State, supra; also Brookin v. State,

Fla.App.1965, 174 So.2d 578. Certainly this matter was the subject of attention by the Supreme Court of Florida in the habeas corpus proceeding, because although not specifically raised the court said the following at page 730 of that opinion [Whitney v. Cochran, supra]:

> "* * * The record is devoid of any evidence that petitioner's counsel failed to act in good faith or that they acted in collusion with the state or from any unfaithful motive. Even an obvious tactical blunder, and we do [fol. 58] not hold that one was demonstrated here, will seldom support a post conviction assault on a judgment of guilt. Unless such an error makes of the trial and the administration of justice a farce or a mockery a conviction will not be disturbed. The record here is devoid of any sufficient showing in this regard. United States v. Malfetti, D.C., 125 F.Supp. 27, affirmed 213 F.2d 728; United States v. Sobell, D.C., 142 F.Supp. 515, affirmed 244 F.2d 520, cert. den. 355 U.S. 873, 78 S.Ct. 120, 2 L.Ed 77; Alexander v. United States, 5 Cir. 290 F.2d 252; Snell v. State, 158 Fla. 431, 28 So.2d 863, cert. den. 331 U.S. 830, 67 S.Ct. 1352, 91 L.Ed. 1844; McCall v. State, 136 Fla. 317, 186 So. 510."

As to the fifth reason, the admissibility of the extrajudicial confession, the appellant relies on the United States Supreme Court decision in Escobedo v. State, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 2d 977. It has been held that this opinion is not to be given retroactive effect. See: Bell v. State, Fla.App.1965, 175 So.2d 80, cert. den. Fla. 1965, — So.2d — [opinion filed November 2, 1965]; Thompson v. State, Fla.App.1965, 176 So.2d 564; Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601; United States v. Pate, 7th Cir.1965, 350 F.2d 240; Hayes v. United States, E.D. Mo. 1964, 236 F.Supp. 225; United States v. Pate, N.D.Ill. 1965, 240 F.Supp. 237; In re Lopez, 42 Cal. Rptr. 188, 398 P.2d 380; Ruark v. People, 1965, — Colo.—, 405 P.2d 751; State v. Johnson, 1965, 43 N.J. 572, 206

A.2d 737; State v. Davis, 1965, 88 N.J.Super. 528, 212 A.2d 859; People v. Hovnanian, 1964, 22 App. Div. 2d 686, 253 N.Y.S.2d 241; Levy, Realist Jurisprudence and Prospective Overruling, 109 U.Pa.L.Rev. 1.

The appellant was duly called before the bar of justice of this State, legally tried and convicted of a capital offense, which original trial has received more than adequate judicial review. It is never a pleasant task when the State must be called upon to carry out the penalty for the commission of a capital crime. However, in the orderly process of the administration of justice, all causes must ultimately come to an end. It appears from this record, and from the prior opinions of the Supreme Court of Florida, that the appellant has at all times been adequately represented by capable members of the Florida bar; and the people of this State have a right to expect the mandates [fol. 59] of the law to be carried out and judicial process brought to an end.

Therefore, the order of the trial judge here under review is hereby affirmed, and the appellant shall stand subject to the original judgment and sentence.

Affirmed as ordered.

[fol. 61]

IN THE SUPREME COURT OF THE STATE OF FLORIDA

DETERMINATION OF JURISDICTION CERTIORARI

Monday, June 20, 1966

R—D—O'C—C—E

DENNIS WHITNEY, Petitioner,

v.

STATE OF FLORIDA, Respondent.

PETITION FOR WRIT OF CERTIORARI TOGETHER WITH SUPPORTING BRIEF ON JURISDICTION—Filed May 9, 1966.

Deny (see memo)

R—DW

Dennis Whitney would show to this Court:

I

The Petitioner filed a Motion in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County seeking relief under Criminal Rule I alleging, inter alia, the following reasons: 1. The Petitioner was denied due process of law on the issue of mercy because of excessive and prejudicial pre-trial publicity [C Deny—O'C Deny]. 2. The closing argument of the State Attorney that a verdict with a recommendation of mercy would allow the petitioner to be paroled was a denial of due process on the question of mercy [E deny]. 3. The court cannot accept a guilty plea without first ascertaining from the defendant that he is aware of the consequences of his plea and his constitutional guarantees. 4. The Petitioner was deprived of a fair trial on the question of mercy, because the jury did not hear defense psychiatric witnesses. 5. Extra-judicial confessions made by the defendant without counsel are inadmissible evidence.

The trial judge held: "A consideration of this Motion reveals that it does not show conclusively that the Movant is not entitled to relief" and ordered the State to file a Reply. The State replied solely on the basis of res judicata. The trial judge agreed in denying relief without a hearing that Whitney v. State, 132 So.2d 599 and Whitney v. Cochran, 152 So.2d 727, were res judicata as to all issues raised [fol. 62] by the Motion. The Third District Court of Appeal disagreed as to the applicability of res judicata as to reasons numbered 1, 4, and 5 above, but nevertheless affirmed the trial court on grounds which conflict with principles of law set forth in decisions of the Florida Supreme Court and the District Courts for the First and Second Districts as hereinafter set forth.

II

The following portions of the record which are sufficient to vest jurisdiction in this Court accompany and are filed with this Petition:

1. Rule I Petition
2. Circuit Court Order directing State to respond
3. State's reply to Rule I Petition
4. Circuit Court Order denying petition
5. Assignments of Error filed with the Third District Court
6. Third District Court Opinion
7. Assignments of Error filed in Whitney v. State
8. Petition for habeas corpus in Whitney v. Cochran

III

The Third District Court in holding:

As to the first reason, lack of due process of law because of excessive publicity, see: Simpson v. State * * *; Sheppard v. Maxwell * * *.

overlooked paragraph 6 of the Rule I Petition which controls the issue:

> Trial counsel for the petitioner, without authority from the petitioner, or other justification; (a) refused to ask the court for a change of venue though requested to do so by the petitioner.

The question raised by this allegation is not one of discretion or competency of counsel as discussed in Simpson (reversed sub nom. Wainwright v. Simpson by the Fifth Circuit Court of Appeals April 11, 1966, case number 23074), but rather the *duty* of counsel as controlled by Milligan v. State, 177 So.2d 75, 77

> * * * The attorney's function is to present alternative courses of action, not make decisions. The ultimate decision-making function is to be left to the client.

[fol. 63] and the mandate of Rule I itself

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall * * * grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law * * *

which prompted the trial judge in this case to order the State to reply to the Petition. The effect of this key provision in Rule I, and the reply of the State, is discussed in Kelly v. State, 175 So.2d 542, 544, and controls here.

> Literally and grammatically, this key provision seems to mean that, if the motion or the files of the case or the records of the case show that the prisoner is entitled to relief (at least to the extent of not conclusively showing the contrary), the court must grant a prompt hearing on the motion. The last clause of the quoted provisions (that at the hearing the court shall "determine the issues and make findings of fact and conclu-

sions of law" with respect to the motion) necessarily contemplates that at that hearing a full opportunity will be afforded to the prisoner, or his legal representative, to present evidence in support of the allegations in the motion, and a similar opportunity to the prosecuting attorney, if he sees fit, to present evidence to the contrary. In no other way could the said hearing comport with the requirements of due process of law; and in no other way can a basis legally be provided for the court to "determine the issues and make findings of fact and conclusions of law" with respect to the motion, as required in the key provision quoted above.

• • •

In its preliminary order, discussed above, the court correctly rules: "A consideration of this Motion reveals that it does not show conclusively that the movant is not entitled to relief." Between the date of the entry of this preliminary order and the date of the entry of the order appealed from, denying the said motion, the only paper filed in the cause was the State Attorney's answer to the said motion, together with the attachments to the answer. As we held earlier in this opinion, nothing in those attachments, as well as nothing else in the files and record of this case, indicates (much less conclusively shows) that the movant is entitled to no relief. As we also held above, the only thing in the record that contravenes the charges in the motion that the appellant was deprived of his right to counsel is the answer filed by the State Attorney, and, as we further held, the allegations contained therein cannot be used as the sole basis for denying a motion for post-conviction relief under Criminal Procedure Rule No. I. A prosecutor's allegations, not supported by the record, must be allowed to be proven by competent, substantial evidence at the hearing before the court, just as the allegations of the

> prisoner's motion, unsupported by the record, must be allowed to be proven by such evidence at that hearing, in order that the court may lawfully "determine the issues and make findings of fact and conclusions of law" with respect to the motion, as required in the above-quoted key provision of Rule No. I. * * *

IV

This court's opinion:

> No motion for change of venue was made, nor were the peremptory challenges exhausted in the case sub judice. Therefore, the cases relied upon by the appellant (see: Irvin v. Dowd * * *; Rideau v. Louisiana * * *) are not applicable.

is apparently a sub silentio holding that the pre-trial publication by television stations of motion pictures showing the defendant in the act of confessing to a capital crime is not a denial of due process. (The record presented to the Third District Court established without contradiction that televised extra-judicial confessions of the petitioner were published prior to trial.) The reliance by the Third District Court on Sheppard, cert. granted November 15, 1965, 15 L.ed 2d 231, is ill-founded. The majority opinion in Sheppard distinguished Rideau and Irvin on the basis that they each involved the pre-trial publication of a confession and went on to say:

> The facts of Rideau set it even further apart from Dr. Sheppard's case. To ask * * * jurors to put entirely aside the visual spectacle of a confession by the very defendant they are charged to presume innocent is indeed close to demanding the impossible.

This court is obligated to follow the holding in Rideau and Estes v. Texas, 14 L.ed 2d 543, 547, that pre-trial publication of such televised confessions is *fundamental error.*

> In Rideau v. Louisiana, 373 U.S. 723 (1963) this Court constructed a rule that the televising of a defendant in the act of confessing to a crime was inherently invalid under the Due Process Clause of the Fourteenth Amendment even without a showing of prejudice or a demonstration of the nexus between the televised confession and the trial.

[fol. 65] As fundamental error, the pre-trial publication of defendant's televised confessions cannot be cured by the failure of counsel to seek a change of venue and is subject to review at any time and in any manner. Anglin v. Mayo, 88 So.2d 918 (Fla. 1956); Young v. State, 177 So.2d 345 (Fla. 1965); Burse v. State, 175 So.2d 586 (Fla. 1965); 2 Fla. Jur., Appeal and Error, Section 290. In Anglin v. Mayo, supra, this court found that the trial court correctly ruled on the issues before it and which were therefore presented on appeal. This court nevertheless reversed by holding:

> Ordinarily this court considers on appeal only those questions tendered by the record and argued by the parties in their briefs on the basis of error properly assigned. However, historically, habeas corpus is a high prerogative writ. It is as old as the common law itself and is an integral part of our own democratic process. The procedure for the granting of this particular writ is not to be circumscribed by hard and fast rules or technicalities which often accompany our consideration of other processes. If it appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty, it is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice. In habeas corpus the niceties of the procedure are not anywhere near as important as the determination of the ultimate question as to the legality of the restraint. So it is in the case at bar that this court felt justified

in raising on its own initiative the question of law heretofore discussed.

V

The Third District Court in holding:

> As to the fourth reason, failure of counsel to call witnesses, see Simpson v. State, supra; also Brookin v. State, Fla. App. 1965, 174 So.2d 578.

overlooked paragraph seven of the Rule I petition which controls the issue:

> The constitutional rights which were waived by Petitioner's counsel through error of omission and commission constitutes a denial of due process and right to counsel, but do not constitute an intentional relinquishment or abandonment of such rights or privileges by your Petitioner, because at the time of trial he did not understand and know what protections were offered him by the Federal and State Constitutions.

[fol. 66] The reliance which the Third District Court placed on Brookin and Simpson is in direct conflict with Kelly v. State, supra, and in direct conflict with Mason v. State, 176 So.2d 76; Hicks v. State, 165 So.2d 204; and King v. State, 157 So.2d 440, all holding that waiver is ordinarily an intentional relinquishment or abandonment of a *known* right or privilege.

VI

Question three, raising the responsibility of the trial judge to ascertain from the defendant that the defendant is aware of the consequences of his guilty plea and his constitutional guaranties, was denied on the basis of res judicata.

The applicable portion of the Rule I Petition avers:

> The Petitioner did not realize, and the Trial Court did not advise him prior to the introduction into evidence of the stipulation, that he was presumed innocent, that he need not incriminate himself with a judicial confession, and that he was subjecting himself to the death penalty by entering into the judicial confession.

An examination of the Petition for Writ of Habeas Corpus forming the basis of this Court's opinion in Whitney v. Cochran discloses that this issue was not raised.

Although this Court by its comment on page 730

> Under the circumstances reflected by this record it was unnecessary to present the stipulation to the trial judge before it was signed.

appeared to be concerned with the problem, the question has neither been briefed nor argued in this Court. This Court should evaluate its gratuitous comment in the light of Nickels v. State, 98 So. 502, 504 (Fla. 1923) which holds:

> A plea of guilty should be entirely voluntary by one competent to know the consequences, and should not be induced by fear, misapprehension, persuasion, promises, inadvertence, or ignorance. Accordingly, it will not bind the defendant where it is entered through intimidation, however slight; and a judgment is not properly entered on it where the court does not satisfy itself of the voluntary character of the plea. It has sometimes been held that *it must be made a matter of record that the plea was voluntary* and uninfluenced by fear. (Emphasis added.)

[fol. 67] and Lee v. State, 166 So.2d 131 (Fla. 1964) and Ostermann v. State, 183 So.2d 873 (Fla. 1966) which also recognize the rule that the defendant must be advised by

the court prior to accepting a guilty plea. This question is thoroughly annotated in 97 A.L.R. 2d 549, "Court's Duty to Advise or Admonish Accused as to Consequence of Plea of Guilty" which summarizes the law at page 556:

> It seems clear that the fact that the accused is represented by counsel at the time he offers a plea of guilty does not relieve the court of the duty of ascertaining that he is informed of the consequences of his plea, and of advising him of such consequences if he is not so informed.

See also Mason v. State, 176 So.2d 76 where this Court held in a related aspect that the trial court must advise the defendant of his constitutional rights and that such advice should be noted in the minutes of the court.

Certainly the State has always taken the position that the stipulation was in fact a judicial confession equivalent to a plea of guilty (Brief of State in Whitney v. Cochran, page 8).

VII

The State Attorney in his closing argument to the jury said:

> They talk to you about his spending the rest of his life in prison. There is no one who can guarantee that. They can't and I can't and you can't, and his Honor can't. Mr. Swan mentioned that to you repeatedly, that by your verdict he would spend the rest of his life in prison. You can't guarantee that and neither can he. There is no one in this courtroom that can guarantee that or guarantee what he will do the next time he gets his hands on this.

The question of the propriety of this portion of the argument was squarely presented in the habeas corpus proceeding—at least by the Petition for re-hearing—but was not commented upon by this Court. Five months later, in Burnette v. State, 157 So.2d 65, the matter of commenting on parole was again argued before this Court which [fol. 67a] this time reversed the conviction by quoting from Singer v. State, 109 So.2d 7, that the defendant has the right to have the question of mercy determined in a fair and impartial proceeding, free from prejudice and inflammatory statements, and holding "it is not the province of a jury to allow the question of whether a prisoner may or may not be paroled to enter into its deliberations."

The discussion and ruling in Burnette would appear to overrule the sub silentio holding in Whitney v. Cochran that the closing argument quoted above was proper.

Wherefore Petitioner prays this Court to grant a Writ of Certiorari and enter its order quashing the decision of the District Court of Appeals, Third District, by remanding this case with directions that an evidentiary hearing be held on the issues presented by the Rule I petition.

Richard Kanner, Attorney for the Petitioner, 1390 NW 14th Avenue, Miami, Florida.

Certificate of Service Omitted in printing.

[fol. 68] IN THE SUPREME COURT OF FLORIDA

July Term, A.D. 1966

Case No. 35,345.

DENNIS WHITNEY, Petitioner,

vs.

STATE OF FLORIDA, Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI—
September 9, 1966

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal, Third District of Florida, in said cause bearing date March 8, 1966, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

cc: Honorable M. P. Carter, Honorable E. B. Leatherman, Honorable James T. Carlisle, Hoporable Richard Kanner.

[fol. 69] SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 905 Misc.

DENNIS MANAFORD WHITNEY, Petitioner,

v.

FLORIDA

On petition for writ of Certiorari to the District Court of Appeal of the State of Florida, Third District.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—March 20, 1967.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate Docket as No. 1167.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Rule No. 1. Motion to vacate, set aside or correct sentence; hearing; appeal

A prisoner in custody under Sentence of a court established by the Laws of Florida claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or Laws of the United States, or of the State of Florida, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting attorney of the court, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the appropriate appellate court from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this rule, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

This rule shall not apply to municipal courts.

The foregoing rule shall become effective upon the filing of this order.